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No. 837

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1965

PARNELL BOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PARNELL BOWLING, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above case on September 29, 1965.

OPINION BELOW

The opinion of the court below (Appendix B, *infra*, pp. 3A-14A) is reported at 351 F.2d 236. No written opinion was rendered by the District Court.

JURISDICTION

The judgment of the court below (Appendix C, *infra*, page 15A) was entered on September 29, 1965. A timely

petition for rehearing was denied on November 3, 1965 (Appendix D, *infra*, p. 16A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where an affiant, for the purpose of securing a search warrant, knowingly states in his affidavit false allegations of material relevancy to the showing of probable cause, does the lack of integrity of such an affidavit destroy probable cause for the issuance of the search warrant, rendering inadmissible into evidence property seized thereunder?

2. Did the affidavit for a search warrant state sufficient facts to establish probable cause for the issuance of the search warrant?

3. Did the search warrant sufficiently describe and identify the property to be seized, and did it state the grounds or probable cause for its issuance?

4. Does a search warrant executed on one day, which execution is recorded on the face of the warrant, sustain a search and seizure at the same premises the next day? Is the search and seizure the next day a search and seizure without a warrant?

5. Where evidence is seized by state officers under an affidavit and search warrant issued by state authority, which evidence would be inadmissible in a state court proceeding because of the invalidity of both the affidavit and the search warrant under the state's constitution, is such seized evidence admissible in a federal criminal proceeding under the Fourth Amendment where the investigation of the case and the fruits of the search and seizure were handed over by the state to the federal authorities on a "silver platter"?

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Applicable constitutional provisions, statutes and rules are set forth in Appendix A, *infra,* pp. 1A, 2A.

STATEMENT OF CASE

Petitioner, Parnell Bowling, was indicted in a two count indictment under Title 18, Sec. 641 U.S.C. Count 1 charges him with unlawfully and wilfully receiving and concealing a Frieden Calculator, property of the United States, with intent to convert it to his own use. Count 2 charges the same, except that it refers to a Victor Listing Calculator (2a).[1]

A motion to suppress evidence was timely filed (4a through 11a). Evidence was presented. The motion was overruled (12a).

Petitioner was tried by jury, found guilty, and was sentenced to one year and one day on each count, the sentences to run concurrently.

Richard Scully, a Cincinnati, Ohio Police Department detective, was investigating the reported theft of an IBM machine from the IBM Company of Cincinnati, Ohio. He came to Newport, Kentucky to interview one Wesley Hennard (18a, 19a).

Hennard told Scully he got the IBM machine from a person named "Jake", and maintained this to Scully until he was arrested. Hennard then changed his story and said he had received the IBM machine from petitioner Bowling (18a, 20a).

---

[1] The letter "a" when used in this Petition refers to petitioner's Appendix below, copies of which have been filed with the Clerk of this Court.

Hennard told Scully during further conversation that he had seen other office equipment *in Bowling's Drug Store,* located in Newport, Kentucky (30a).

On April 2, 1963, notwithstanding that informant Hennard never told Scully he had ever seen any articles whatsoever in petitioner's home, Scully nonetheless, "taking a flyer", took from his own pocket a list of stolen items, on the "assumption" that he "expected or hoped to find" them in petitioner's home, among other places, and incorporated them into an affidavit for a search warrant to search *the home of petitioner,* in Cold Spring, Kentucky (20a, 21a), by stating in the affidavit that he:

> ". . . was informed on this date by W. A. Hennard, who is in custody, that the following stolen articles are in the possession of the said Parnell Bowling and are located *in the residence* described herein at the present time . . . ." (8a). (Italics ours.)

At 4:30 p.m. on the same date, a search warrant was issued by Hon. A. J. Jolly, Judge of the Campbell County, Kentucky Court, to search the residence of appellant Bowling, and seize "stolen articles mentioned in the affidavit hereto attached . . ." (9a). The items were not stated in the search warrant, and Campbell County officers Neltner and Arnold who were executing the search warrant did not have the affidavit with them (56a).

The search warrant was executed at the home of petitioner Bowling in Cold Spring, Kentucky by the Campbell County, Kentucky Police about 6 p.m. on April 2, 1963, in the company of Cincinnati, Ohio detectives and Newport, Kentucky police (36a, 39a, 40a).

Two Cincinnati detectives searched the basement of petitioner's home (36a). Officers from both the Newport and Campbell County, Kentucky Police Departments milled

about the upstairs of petitioner's home, occasionally helping the Cincinnati detectives (36a, 40a, 41a, 42). None of the articles listed by Scully in his affidavit were found either in Bowling's home, his drug store, or elsewhere (25a). The officers saw nothing they knew at the time was stolen (44a, 45a, 57a). They did nothing more than write down serial numbers (36a).

No one was arrested that evening, nothing was seized (but a Veratron Transceiver Radio so encased that the serial number could not be read) and the officers left (23a, 42a). A return was made on the face of the search warrant on April 2, 1963 (9a, 66a):

> "4-2-63
> Executed this warrant at 6:15 p.m. by searching above premises for articles believed stolen in Greater Cincinnati area.
>
> Lt. G. Arnold".

The following morning, April 3, 1963, the Cincinnati detectives checked the serial numbers they had obtained in petitioner's home the evening before with the Bureau of Records of the Cincinnati, Ohio Police Department, and then determined that some goods, including the Frieden calculator and the Victor Adding Machine (for which petitioner was later indicted) had been reported stolen (24a, 25a, 37a, 38a, 42a, 45a, 57a).

Later in the morning of April 3, 1963, Lt. Arnold of the Campbell County, Kentucky Police secured a warrant of arrest charging petitioner Bowling with possession of stolen property, and petitioner was immediately arrested in Newport, Kentucky (45a).

At the time of petitioner's arrest, Charles J. Schear, his attorney, who was present (45a), told Lt. Arnold that police officers were not to go out and search the Bowling

home on John's Hill Road, Cold Spring, Kentucky, nor to seize any material whatsoever at the home, unless they were armed with a proper search warrant (51a, 52a). There was no search warrant (58a).

While petitioner was being arrested in Newport, detectives Quitter and Collins of the Newport Police Department, together with two Newport Jail trustees (prisoners) were already at petitioner's home in Cold Spring, Kentucky, five miles outside the city limits of Newport (35a), with a moving van (47a). They were seizing and removing property from his home (58a, 59a). Later, Campbell County Police Officer Neltner arrived at the home to assist in removing goods (58a, 59a).

The Victor Adding Machine and the Frieden Calculator taken from petitioner's home on April 3, 1963 were turned over to FBI Special Agent Silas by the State officers. On April 8, 1963, Agent Silas swore to a complaint charging petitioner with receiving these two items as stolen goods (16a, 17a).

Neither Agent Silas nor any other Federal officer participated in the search of the Bowling home on April 2, 1963, under the search warrant issued by Judge Jolly; nor did they participate in the seizure made in the Bowling home on the morning of April 3, 1963 (16a, 17a), made without a search warrant. All evidence FBI Agent Silas received was from Kentucky State officers (17a). The evidence was turned over to Silas by the State officers on a "silver platter".

ARGUMENT

A writ of certiorari should be granted because the Sixth Circuit Court of Appeals failed to decide an important question of federal law, which has not been, but should be, settled by this Court (Issue 1); that other questions and issues here involved were decided in conflict with applicable decisions of this Court; that the search and seizure involved herein contravened the Fourth Amendment of the Constitution of the United States and therefore, the use in evidence of the items seized was prohibited; that this Court should review, reconsider and modify its holdings in the *Elkins* and *Rios* cases only to the extent that where a search and seizure would be invalid under a state's constitution, the state, and not the federal law, should be applicable in a case where the evidence is seized by state officers, under a state warrant, and turned over to federal authorities on a "silver platter".

1. The Allegations in the Affidavit for the Search Warrant Were Knowingly, Falsely and Fraudulently Made by Affiant, and Were of Such Material Relevancy as to Destroy the Integrity of the Affidavit, Rendering Inadmissible Into Evidence Property Seized.

The Sixth Circuit did not decide this issue although it called it "The more formidable problem posed by this case, . . ." (Appendix B, *infra*, p. 12A; 351 F.2d 236, 241).

It by-passed the merits of this issue on the mistaken theory that this was "apparently" never specifically raised before the District Judge, notwithstanding the fact that in its decision it stated that one of the issues "presented to the District Judge" by the motion to suppress evidence made in the district court was that "The search warrant as issued

was fatally defective because issued without 'basis of fact' and as a 'fishing expedition' or 'flyer'." (Appendix B, *infra*, pp. 5A, 12A; 351 F.2d 236, 237.)

The Supreme Court of the United States has never directly decided this issue, and it is one that should be settled by this Court. The closest this Court has come is in *Rugendorf* v. *United States*, 376 U.S. 528, where, in dealing with a claim of falsity in an affidavit, this Court said:

> "Petitioner attacks the validity of the search warrant, This Court has never passed directly on the extent to which a court may permit such an examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause' . . ."

This issue was raised in the District Court by petitioner where one of the grounds set forth in the motion to suppress was stated as follows (5A; and Appendix E, *infra*, 21A):

> "That the affidavit for search warrant, and the search warrant were made and issued without basis of fact, and solely as a 'fishing expedition' and as 'a flyer'."

Extensive evidence was introduced in the District Court before the District Judge (16a-72a). The District Judge did not render a written opinion.

But assuming petitioner had not raised the issue in the District Court in the exact or technical way the Sixth Circuit thought it should have been, the issue should have been considered under Rule 52(b), Federal Rules of Criminal Procedure, which states that plain error or defects affecting substantial rights may be noticed although they are not brought to the attention of the court. The Sixth Circuit referred to Rule 52(b) in footnote 1, on printed page 10 of its decision (Appendix B, *infra*, p. 13A), but failed to follow it.

This is not a case where falsity in an affidavit to secure a search warrant becomes a part of the affidavit through mistake, inadvertence, or because of false information given affiant by an informer believed to be reliable. This is a case where the affiant willfully, knowingly and deliberately put his own false statements in the affidavit. These statements were of substantial materiality, without which a search warrant would not have issued. It is this type of case which this Court has never passed upon, but should.

The pertinent testimony of affiant Lt. Scully bearing on this point, heard by the District Judge on the motion to suppress is (20a, 21a):

> Q. Then you swore the — to the affidavit on April the second, 1963, listing five items, a Victor Adding Machine with a serial number and then four other items, isn't that correct?
>
> A. Yes, sir.
>
> Q. Now will you tell His Honor Judge Swinford, why you listed those five items in that affidavit?
>
> A. In talking to Mr. Hennard, he stated that Parnell Bowling had some other office equipment in his drug store, he told us it was in the rear where the prescription department was and that he didn't know whether they were typewriters or adding machines but it was office equipment and on that assumption, when I filed this affidavit, of the list of stolen items that I had in my pocket, I incorporated these serial numbers of items that I expected or hoped to find either in Parnell's drug store or in his home, or in a building that was under construction at Eighth and Central.
>
> Q. In other words, let me see, Mr. Scully, if I understand you correctly. All that Hennard told you is that in Bowling's drug store and you know as a matter of fact that Mr. Bowling owns and operates a drug store on Eighth and Central in the City of Newport, isn't that correct?
>
> A. That is correct.

Q. He told you that in Bowling's drug store, in the prescription department, were some items of office equipment, isn't that correct?

A. That is correct.

Q. So that based upon that, you then, from your file in Cincinnati, picked out items that you listed in here, with the serial number, isn't that correct?

A. That's correct.

Q. Hennard didn't give you these items and the serial numbers did he?

A. He did not.

Q. And, as a matter of fact, what Hennard told you, that is Hennard said he saw them in the drug store, isn't that correct?

A. Saw some items in the drug store.

Q. Isn't it correct, Officer Scully, that actually you didn't know at that time whether you would ever find these items or any other items there, but what you were in effect doing was taking a flyer in the hope that you would find these somewhere in Parnell Bowling's place?

A. That's correct.

Q. Is that right?

A. That's right.

On cross examination by Assistant U. S. Attorney Brooks, Lt. Scully testified (30a):

"Q. Did he indicate that he had actually seen office equipment on the premises of Parnell Bowling?

MR. WEINTRAUB: I want to object to that, if Your Honor please, on this basis: What premises of Parnell Bowling?

MR. BROOKS: On any premises of Parnell Bowling.

A. Yes, he did.

Q. What premises?

A. The drug store at Eighth and Central."

After receiving the foregoing information from informant Hennard, the sole source of affiant's information, Lt. Scully swore to the following affidavit (8a):

AFFIDAVIT FOR SEARCH WARRANT

Affiant, Richard Scully, being first duly cautioned and sworn states that the laws of the Commonwealth of Kentucky, which prohibit receiving and possessing stolen property are being violated by Parnell Bowling at his residence known and designated as Box 146 F, Johns Hill Road, Cold Spring, Kentucky, which consists of a one (1) story red wire cut brick building; that affiant's reasons for stating the laws are being violated are that affiant was informed on this date by W. A. Hennard, who is in custody, that the following stolen articles are in the possession of the said Parnell Bowling and are located in the residence described herein at the present time:

1 Victor Adding Machine, Serial No. 1635-392

1 IBM Electric Typewriter, Serial No. 1261503

1 Underwood Electric Typewriter, Serial No. E-13-8753824

1 IBM Electric Typewriter, Serial No. 1186204

1 Royal manual typewriter, Serial No. 6409538

and other stolen property, are in the premises of the said Parnell Bowling and are being concealed in the premises occupied by the said Parnell Bowling, which said premises are more particularly described as follows:

A one (1) story red wire cut brick building located at Box 146 F, Johns Hill Road, Cold Spring, Kentucky.

Affiant further states that the conduct described herein which occurred in and on the premises described herein are in violation of the laws of Ken-

tucky and contrary to the peace and dignity of the Commonwealth of Kentucky.

/s/ RICHARD SCULLY

Subscribed and sworn to before me, Notary Public, this 2nd day of April, 1963.

/s/ BETTE L. RIEDMATTER
My comm. expires: 3/14/64

A. J. JOLLY, Judge

Comparing the testimony of affiant Scully (20a, 21a, 30a) with the affidavit Scully signed (8a), three factual inaccuracies of a material relevancy to the showing of probable cause, each of which destroyed the integrity of the affidavit, are readily apparent:

1. Affiant's information as to the articles listed in the affidavit did not come from informant Hennard but was from a list Scully took from his pocket (20a, 21a);

2. At no time did Scully testify that informant told him that petitioner had any "stolen" articles whatsoever, yet Scully swore in his affidavit that Hennard informed him the "following stolen articles" and "other stolen property" were in petitioner's residence (8a);

3. Although Scully testified that informant told him that the "equipment" he saw was in petitioner's "drug store at Eighth and Central" (30a), which is in Newport, Kentucky, Scully swore in his affidavit that informant told him that stolen articles and property were "located" and "are being concealed" by petitioner at his residence in Cold Spring, Kentucky (8a).

The factual inaccuracies contained in the affidavit were within the personal knowledge of the affiant, because they were not supplied by the informant but were admittedly

concocted by the affiant himself, who "was taking a flyer in the hope he (you) would find these somewhere in Parnell Bowling's place" (21a).

The false affidavit started into motion a process whereby appellant's rights were illegally invaded, by duping the Magistrate into issuing a search warrant not based upon probable cause.

In *Rugendorf* v. *U. S., supra,* at page 532, this Court said:

> "In addition, the affidavit alleged that Leo and Samuel Rugendorf were brothers and that Leo was a fence for professional burglars. Although one of the informants who gave the latter information added, incorrectly, that Samuel Rugendorf was associated with Leo in the meat business, there was direct information from another informant of the FBI that Leo was a fence, and nothing was shown to prove this untrue. The factual inaccuracies depended upon by petitioner to destroy probable cause—i. e., the allegations in the affidavit that petitioner was the manager of Rugendorf Brothers Meat Market and that he was associated with his brother Leo in the meat business—were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit."

Paraphrasing *Rugendorf* to place the law in positive form, the decision establishes that where factual inaccuracies of material relevancy to the showing of probable cause, within the personal knowledge of the affiant, are stated in an affidavit to secure a search warrant, it goes to the integrity of the affidavit and destroys probable cause for issuing the search warrant.

In *King* v. *U. S.,* 282 F.2d 398, footnote 4, at page 400, cases are cited showing the rule in federal courts to be that ". . . false facts given by affiant will vitiate the war-

rant and search". The Court in discussing the requirements of Section 41(e) said:

> "It would be an anomaly if it could be said that the rule has been obeyed when, instead of omitting the affiant's name altogether, another person's name is deceptively substituted. If it should be held that the use of a mere sham has the effect of validating the warrant, then the aggrieved party would be frustrated in his effort to discover who the affiant is and to test the legality of the search, as authorized by the rule. The rule's remedial procedure would be vitiated."

The use of an affidavit containing deliberately made false, substantial and material allegations necessary to the issuance of a search warrant should not be permitted. This Court recognized a similar injustice when it abolished the "silver platter" doctrine by the *Elkins* decision, 364 U.S. 206. Its subsequent decisions have reinforced its determination to stamp out this form of tyranny and injustice. It should do so in this case.

The Fourth Amendment to the Federal Constitution and Section 10 of the Constitution of Kentucky each guarantee against unreasonable searches and seizures. Each provides that a warrant shall not issue but upon probable cause, *"supported by oath or affirmation"* (italics ours). This means an oath made in good faith. It does not mean an oath made by an affiant who knows what he is swearing to is false, but which allegations he needs to secure a search warrant.

To permit this kind of conduct condones the use of deception and falsity as a means of avoiding the issue of "probable cause". Its result is "unreasonable searches and seizures" specifically prohibited by both the Federal and State Constitutions. It renders a person affected helpless, and without remedy.

This Court must enunciate the law clearly and forcefully in order to stamp out a vicious practice indulged in by over-zealous "officers of the law".

2. The Affidavit for a Search Warrant Did Not State Sufficient Facts to Establish Probable Cause for the Issuance of the Search Warrant.

A. The Affidavit for a Search Warrant Stated Conclusions Only.

The affidavit (Printed in full, Appendix E, pp. 17A) in this case, disregarding its falsity, is itself insufficient to support the warrant because it was made by affiant upon hearsay information given to the affiant by a named informant, W. A. Hennard, but does not disclose on its face the basis for crediting the informant's conclusion. Everything contained in the affidavit is a conclusion.

Under both Federal and Kentucky decisions an affidavit which merely states affiant's belief, or the belief of one not the affiant, without setting forth facts upon which the belief is based, does not establish probable cause for issuance of a search warrant. *United States* v. *Ventresca,* 380 US 102,; *Aguilar* v. *Texas,* 378 US 109; *Jones* v. *U. S.,* 362 US 257;*Giordenello* v. *U. S.,* 357 US 480; *Nathanson* v. *U. S.,* 290 US 41; *Schoeneman* v. *U. S.,* 317 F 2d 173; *Commonwealth* v. *Davenport,* 366 SW 2d 171; *Messer* v. *Commonwealth,* 350 SW 2d 486.

The pertinent part of the affidavit (Appendix E, pp. 17A) is as follows:

> ". . . that affiant's reasons for stating the laws are being violated are that affiant was informed on this date by W. A. Hennard, who is in custody, that the following stolen articles are in the possession of the said Parnell Bowling and are located in the residence described herein at the present time:

> 1 Victor Adding Machine, Serial No. 1635-392
> 1 IBM Electric Typewriter, Serial No. 1261503
> 1 Underwood Electric Typewriter, Serial No. E-13-8753824
> 1 IBM Electric Typewriter, Serial No. 1186204
> 1 Royal manual typewriter, Serial No. 6409538
> and other stolen property, are in the premises of the said Parnell Bowling and are being concealed in the premises occupied by the said Parnell Bowling, which said premises are more particularly described as follows: . . . ."

All that the affidavit relates is that informant Hennard stated to affiant Scully that on the date that the affidavit was made certain stolen articles were in Bowling's possession concealed at his residence, "at the present time". These are bare conclusions. The issuing Magistrate should have been informed by the affidavit *when and how* the informant came to his conclusion that stolen articles were located in appellant's home. (Did informant speak from personal knowledge? Did informant actually see them there? When did he see them there?).

The allegations in the present affidavit parallel the affidavits in *Aguilar, Nathanson* and *Giordenello, supra.*

In *Giordenello,* 357 US 480, at page 481, a federal narcotics agent swore to a complaint, which read in part:

> "The undersigned complainant (Finley) being duly sworn states: that on or about January 26, 1956, at Houston, Texas, in the Southern District of Texas, Vito Giordenello did receive, conceal, etc., narcotic drugs, to-wit: Heroin, Hydrochloride, with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code."

In holding the complaint to be insufficient to support the warrant, the Court, at pages 486-487, stated:

> "The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer. The insubstantiality of such an argument is illustrated by the facts of this very case, for Finley's testimony at the suppression hearing clearly showed that he had no personal knowledge of the matters on which his charge was based. In these circumstances, it is difficult to understand how the Commissioner could be expected to assess independently the probability that petitioner committed the crime charged."

In *Nathanson* (290 US, at pages 44-45) the applicable recitals are as follows:

> "Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave. . . ."

The Supreme Court struck down this affidavit, and later, in *Jones* (262 US, at page 269) said:

> "We held in Nathanson v. U. S., 290 US 41, 78 L ed 159, 54 S Ct 11, that an affidavit does not establish probable cause which merely states the affiant's belief

> that there is cause to search, without stating facts upon which that belief is based. A fortiori this is true of an affidavit which states only the belief of one not the affiant."

In *Aguilar,* two Houston police officers applied to a local Justice of the Peace for a warrant to search for narcotics in petitioner's home, and in their affidavit recited that:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

Holding this affidavit to be insufficient because it stated mere conclusions, the Court in reaffirming *Nathanson, Giordenello* and *Jones,* said:

> "The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." He necessarily accepted "without question" the informant's "suspicion," "belief," or "mere conclusion."

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 US 257, 4 L ed 2d 697, 80 S Ct 725, 78 ALR2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 US 528, 11 L ed 2d 887, 84 S Ct 825, was "credible" or his information "reliable." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," Giordenello v. United States, supra, 357 US at 486, 2 L ed 2d at 1509; Johnson v. United States, supra, 333 US at 14, 92 L ed at 440, or, as in this case, by an unidentified informant."

The latest pronouncement on this subject is *Ventresca, supra,* where this Court held that although "Technical requirements of elaborate specificity" need not be set forth in an affidavit to sustain its validity, "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. See *Aguilar* v. *Texas, supra.*"

The affidavit at issue here was not detailed and specific as the *Ventresca* affidavit, and it fails to meet the standards of interpretation laid down in *Ventresca* for reviewing courts to follow.

B. The Affidavit for a Search Warrant did not show a substantial basis for crediting the hearsay.

In *Jones,* the Supreme Court state (362 US at page 271):

> "It is not suggested that the Commissioner doubted Didone's word. Thus we may assume that Didone had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. **Had that been all it might not have been enough;** but Didone swore to a basis for accepting the informant's story. *The informant had previously given accurate information.* His story was corroborated by other sources of information. And petitioner was known by the polce to be a user of narcotics. *Corroboration through other sources of information reduced the chances of a reckless or PREVARICATING tale;* that petitioner was a known user of narcotics made the charge against him much less subject to skepticism than would be such a charge against one without such a history." (Emphasis added).

Assuming, arguendo, that it would have appeared in the affidavit of Scully that informant Hennard told Scully that on the date of the affidavit informant had purchased stolen goods from appellant at his home, and that informant saw other named and unnamed stolen property in appellant's home when the purchase was made, under *Jones* even these statements in the affidavit could not cure its defects, because the affidavit failed to show the basis for accepting informant's information.

As required in *Jones,* Scully's affidavit should have stated that Hennard previously had given accurate information; that his story was corroborated by other sources of information; and that appellant was a known dealer in stolen goods.

In the instant case there is no reference to informant,

W. A. Hennard, being reliable, or having given previous reliable or correct information to the affiant. To the contrary, there is a statement in the affidavit that Hennard is a person "who is in custody." It is likewise important to note from the testimony that informant first told affiant Scully he got the IBM machine from "Jake", and later, after arrest, changed his story and named petitioner (19a, 20a, 37a).

3. The Search Warrant Did Not Sufficiently Describe and Identify the Property to Be Seized, and Did Not State the Grounds or Probable Cause for Its Issuance. It Was a General Warrant to Conduct a General Exploratory Search.

A. The Search Warrant Did Not Identify the Property to Be Seized.

The Fourth Amendment provides that a warrant shall describe the things to be seized. Rule 41(c), Rules of Criminal Procedure, provides the judge or commissioner upon proper showing "shall issue a warrant identifying the property." The warrant in this case failed under each because it failed to identify the property the officers were to search for and seize.

The search warrant is printed at Appendix E, *infra,* p. 19A. The only reference to or description or identification concerning property to be searched for or seized was the direction of the issuing judge to the police officers to search the premises ". . . for the detection of and seizure of stolen articles mentioned in the affidavit hereto attached . . .". Aside from the legal insufficiency of the warrant on its face, no affidavit was attached to or accompanied the warrant (56a).

That the warrant itself was insufficient (even as a practical matter) in failing to particularly describe things to be detected and seized, is readily apparent from the testimony of Police Officer Linus Neltner (55a, 56a):

Q. You and Lt. Arnold were executing a search warrant issued by His Honor Judge A. J. Jolly, judge of the Campbell County Court, weren't you?

A. That's correct.

Q. Were you actually doing that? Were you actually there executing that warrant?

MR. BROOKS: I object.

THE COURT: He says he was.

Q. Well, then tell us, under the search warrant, what items were you looking for?

A. We were looking for office equipment.

Q. Well, what particular office equipment did you first go out there to look for, under the search warrant?

MR. BROOKS: The warrant speaks for itself.

THE COURT: Let him have the search warrant. I think the court may assume that he is looking for whatever it says on the search warrant.

(Reporter's note: An off-the-record discussion was held at this time.)

MR. WEINTRAUB: Well, Officer Neltner, I am handing you what has been admitted as a true and correct copy of the search warrant that you and Lt. Arnold were armed with. Now tell His Honor, Judge Swinford, what items you were looking for.

MR. BROOKS: Your Honor, I think the warrant speaks for itself. The affidavit describes them and other stolen property and that is what he said.

MR. WEINTRAUB: No, no, if Your Honor please.

THE COURT: Overruled. He is looking at the search warrant, he had to be searching for some particular thing when he went out there under a search warrant.

MR. BROOKS: Yes, sir.

Q. Would you answer the question?

THE COURT: What were you searching for when you went there under that search warrant. What were you looking for?

A. We were looking for office equipment, Your Honor.

THE COURT: Office equipment. Now, he asked you what particular office equipment. Was there any particular office equipment?

A. Typewriters.

THE COURT: Was it on the search warrant?

A. It doesn't say here. Your Honor, it doesn't state on the search warrant.

MR. BROOKS: I think probably he may be looking at the warrant, rather than the affidavit, Your Honor.

MR. WEINTRAUB: Well, if Your Honor please, I want to object to that.

MR. BROOKS: Well, he can't remember the names and numbers of these particular machines, Your Honor.

THE COURT: Objection —

MR. WEINTRAUB: The United States Attorney knows better than that.

THE COURT: Objection sustained. He has to go by the warrant.

MR. BROOKS: The affidavit describes the property.

THE COURT: I know but he didn't have the affidavit when he went to execute the warrant. The affidavit is back with the county judge.

Mr. Brooks, Assistant U. S. Attorney, said the warrant speaks for itself, and the Court stated that the officer "has to go by the warrant." Then noting the dilemma of the officer because the warrant does not describe anything but says only "stolen articles," Mr. Brooks then conceded that it was the affidavit that described the property. To this

the Court retorted that the officer didn't have the affidavit when he went to execute the warrant because the affidavit was back with the County Judge! (56a).

Bearing out the Court's last comment, and the confusion in the mind of the officer created by the lack of description in the search warrant, is the return made on the warrant (9a):

> "4-2-63.
> Executed this warrant at 6:15 P.M. by searching above premises for *articles believed stolen in Greater Cincinnati area.*" (Italics ours).

The officers themselves did not know what they were looking for!

The fact that this warrant merely directed the officers to search for and seize "stolen articles" makes this search and seizure a "general exploratory search," which is forbidden. *Go-Bart Importing Co.* v. *U. S.*, 282 US 344; *Marron* v. *U. S.*, 275 US 192.

It was this very type of general warrant that this Court condemned in *Stanford* v. *Texas*, 379 U.S. 476, when it held that it failed to meet the requirements of the Fourth Amendment that warrants must particularly describe the "things to be seized", saying that the "indiscriminate sweep of that language [in the warrant at issue] is constitutionally intolerable".

B. The Search Warrant did not state the grounds or probable cause for its issuance.

The warrant was insufficient because it failed to "state the grounds or probable cause for its issuance," as required by the Fourth Amendment and by Rule 41 (c). Nowhere in the warrant were any "grounds" or "probable cause" stated.

Wong Sun v. *U. S.*, 378 US 471, involved an arrest without a warrant under the Narcotic Control Act of 1956, and the Court held the terms "probable cause" for purposes of the Fourth Amendment and "reasonable grounds" as used in the statute, mean substantially the same.

We submit the failure to "state the grounds or probable cause for its issuance" was contrary to Rule 41 (c), and was a violation of appellant's right under the Fourth Amendment. See Headnote 1 in 9 L.ed 2d at bottom of page 449, citing *Draper* v. *U. S.*, 358 US 307, 310 note 3, 3 L.ed 2d 327, 330, 79 S. Ct. 329; *United States* v. *Walker* (CA 7, Ill), 246 F.2d 519, 526.

4. The Property Introduced Into Evidence Was Illegally Seized and Taken From the Home of Petitioner Without a Search Warrant.

The right to be secure in one's home against unreasonable searches and seizures, especially against a search and seizure without a search warrant, is a basic constitutional guarantee. Rule 41(e), Rules of Criminal Procedure, provides for the suppression as evidence of property "illegally seized without warrant". Petitioner made such timely motion to suppress.

On the face of the warrant issued by Judge Jolly, there appears at the bottom thereof the following (Appendix E, *infra*, p. 19A):

> "4-2-63.
> Executed this warrant at 6:15 P.M. by searching above premises for articles believed stolen in Greater Cincinnati area.
> /s/ Lt. G. Arnold"

At 4:30 P.M., April 2, 1963, a search warrant was issued to search the home of petitioner. This was done, as the

return shows on April 2, 1963 — the same day. On this day the officers left petitioner's home. They arrested no one; they found nothing, and took nothing that was stolen. They did not find any of the items listed in the search warrant. All they did was list serial numbers. Late the next morning, April 3, 1963, the officers went back to petitioner's home and at that time seized and removed property from it, including the two items set forth in the indictment. They had no warrant or other document or authority with them on the morning of April 3, 1963 authorizing or directing this action.

We can find no authority permitting the officers to return to petitioner's home the next day (April 3, 1963), and to search and seize property without a new search warrant, the warrant of the previous day having been executed, it was at an end.

5. The Validity of the Affidavit and Search Warrant Should Be Determined by Kentucky Law.

We respectfully submit that this Court should grant certiorari to re-evaluate its decisions in *Elkins* v. *U. S.*, 364 U.S. 206, and *Rios* v. *U. S.*, 364 U.S. 253, to the extent that it was held that the test of whether evidence has been obtained in an unreasonable search and seizure by state officers and, consequently, not admissible in a federal criminal trial, is one of federal law to be determined in accordance with the basic principles governing the validity of searches and seizures by federal officers under the Fourth Amendment, and is not to be enlarged or diminished by state courts.

We respectfully advance the proposition that *Elkins, supra,* and *Rios, supra,* should be modified to the extent that where, as in this case, evidence is seized by state officers,

under an affidavit and search warrant issued by the authority of the state, and which are invalid under the state's constitution, federal courts should hold such evidence not admissible in a federal criminal proceeding. Or stating it conversely, where a state by its constitution and the decisions of its highest court recognizes and gives equal, if not greater effect to the right of a person to be secure against unreasonable search and seizure as does the Fourth Amendment, its law, that the search and seizure is invalid, should be applied where such state-produced evidence is sought to be introduced in a federal criminal trial.

To hold otherwise means that evidence obtained by an illegal search and seizure made by state officers, clearly violating a citizen's rights under his state's constitution prohibiting its use in that state's courts, can be used against him by the expedient of getting the case into federal court, as was done in *Rios, supra,* which is contrary to the spirit at least of *Elkins, supra.* It allows to be done by indirection that which a state court of the state initiating the proceedings would not be permitted to do. It condones, and even tends to encourage, subterfuge and violation of law by state officers.

A search and seizure, invalid at its inception, should not be given life in another jurisdiction. We conceive the correct rule should be that a federal court should have the right to review only when a state fails to follow reasonable standards; not when it does follow them! To permit the review in federal court in all cases means the "wiping out" by federal courts of the search and seizure clauses of the constitutions of all 50 states.

Kentucky is an exclusionary state. Under Section 10 of the Kentucky Constitution the affidavit in this case is faulty and fatal because it fails to state "when and how" the informant arrived at his information. Ken-

tucky has held that when an affidavit is based on information or belief, it must disclose *when* the observation was made by the informant. In *Messer* v. *Commonwealth,* 350 SW 2d 486 (1961), the Kentucky Court of Appeals held:

> "The affidavit for the warrant issued for the search of his premises was based on information and knowledge, stated as follows:
>
> " 'Paul Stamper, Sheriff Knox County, the affiant, was told by Charles Mays, Deputy Sheriff Knox County, that Lige Messer a known boot legger of Knox County has now in his possession a large quantity of intoxicating beverages, whiskey, beer & etc. for the purpose of sale on his premises, or filling station, which he has leased, & also in cars of various kinds located on said premises, and under his control & known as Messer Pan Amm Filling Station located at Heidrick, Knox Co. Ky. at Junction of U. S. 25E & Highway 11 on Right hand side going north.'
>
> "Since the appellant's conviction, this Court, on June 23, 1961, in Henson v. Commonwealth, Ky., 347 S.W.2d 546, after reviewing the decisions therein collected, restated the principle that affidavits for search warrants must disclose the time at which the observation was made which is the source of the informant's knowledge. The above quoted affidavit fails to meet that standard, and hence the affidavit was insufficient to support the warrant and the evidence obtained on the search was not admissible. It is unnecessary to discuss other grounds raised for reversal, but see Henry v. Commonwealth, Ky., 316 S.W. 2d 864, admitted by the Commonwealth as sustaining appellant's contention for reversal."

In the instant case, the affidavit fails to state "when" the informant Hennard obtained his information.

In *Commonwealth* v. *Davenport,* 366 SW 2d 171 (1963), the Kentucky Court of Appeals required the affidavit to

not only state "when" but *"how"* the informant reached his conclusions:

"The affidavit which was excuted by the sheriff of Whitley County reads in part as follows:

" 'The affiant states that he bases the aforesaid belief on information furnished him by Isham Alder, a reputable citizen of Whitley County, Kentucky, and who is also a citizen and resident of Whitley County, Kentucky, and a Constable of said County and State, and who on today, July 30, 1961, told the affiant as follows:

" 'Loraine (Mrs. Tracy) Davenport is selling whiskey; that she just bought a big load of red whiskey, wine, gin and other alcoholic beverages, and she has some whiskey, wine, beer, gin and other intoxicating beverages now in her house or premises adjacent thereto on today for the purpose of sale, gift, or barter in violation of the Local Option Law."

"In Henson v. Commonwealth, Ky., 347 S.W.2d 546, it was held that where an affidavit for a search warrant states the essence of illegal possession as an ultimate fact, the affidavit must relate how and when the fact was observed.

"In Williams v. Commonwealth, Ky., 355 S.W.2d 302, it was pointed out that even before the Henson case, it was the rule that when an affidavit is based on information or belief, it must disclose when the observation was made by the informant. See also Williamson v. Commonwealth, Ky., 349 S.W.2d 825, and Messer v. Commonwealth, Ky., 350 S.W.2d 486.

"It is argued by the Commonwealth in the case at bar that the expression, 'who on today, July 30, 1961 told that affiant' definitely fixes the date and time the observation was made, the information obtained and imparted. The quoted expression, together with the statement that she had just bought a big load of alcoholic beverages and that she had some of such beverages

> in her house, is perhaps specific enough as concerns the time that appellee had in her possession the intoxicating liquors for the purpose of sale, but it does not state the manner in which the observation was made."

The affidavit in the present case also fails to disclose "how" informant Hennard knew petitioner had stolen goods in his possession at his home.

In directing a search for "stolen articles mentioned in the affidavit hereto attached . . ." (Appendix E, *infra*, p. 19A), the warrant is defective because it fails to describe the property sought, as required by Section 10 of the Kentucky Constitution. The affidavit was not attached to the warrant (56a).

Under Kentucky law, the affidavit cannot aid the warrant. In *Smith* v. *Commonwealth*, 276 SW 495, 496, the Kentucky Court of Appeals held:

> "The affidavit upon which the warrant was based contained the same description, with the additional words, 'situated on Main street.' However, the officer proceeds under the warrant alone, and it is not aided by the affidavit, therefore it is essential for the warrant to describe the property to be searched with sufficient accuracy to locate it with reasonable certainty."

Following this same line of reasoning, the Kentucky Court of Appeals held in *Staton* v. *Commonwealth*, 240 SW 2d 630, that the warrant must be sufficient in and of itself.

The Fourth Amendment to the Federal Constitution and Section 10 of the Kentucky Constitution are identical almost to the wording. Each provides for the security of people from unreasonable searches and seizures. Each pro-

vides that no warrant shall issue without probable cause, supported by oath of affirmation. Each provides that the place to be searched and the persons or things to be seized must be described:

FOURTH AMENDMENT, FEDERAL CONSTITUTION	SECTION 10, KENTUCKY CONSTITUTION
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."	"The people shall be secure in their persons, houses, papers and possessions from unreasonable search and seizure; and no warrant shall issues to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

The decisions of the Kentucky Court of Appeals interpreting Section 10 of the Kentucky State Constitution relating to searches and seizures are in consonance with the "standard of reasonableness" a state must guarantee. *Ker* v. *California,* 374 US 23.

The *Elkins* case, 364 US 206, abolished the "silver platter" doctrine, so that federal officers could not reap the benefit of evidence wrongfully obtained by state officers.

On June 15, 1964, this Court handed down three important decisions relating to scope of the incorporation of the Fourth and Fifth Amendments in the Fourteenth Amendment. *Aguilar* v. *Texas,* 378 US 109; *Malloy* v. *Hogan,* 378 US 1; and *Murphy* v. *Waterfront Commission,* 378 US 52.

Aguilar deals with failure to establish probable cause in the issuance of a search warrant in state proceedings.

Malloy guarantees the protection of the Fifth Amendment in proceedings in a State Court.

Murphy reversed *U. S.* v. *Murdock,* 284 US 141, and *Feldman* v. *U. S.* 322 US 487, which cases had held that testimony self-incriminatory under State law could be compelled in Federal Courts and used therein as well as the obverse, that testimony self-incriminatory under Federal law could be compelled in State Court and introduced as evidence therein. This Court in the *Murphy* case stated:

> "We hold the constitutional rule to be that a State witness may not be compelled to give testimony which may be incriminating under Federal law unless the compelled testimony and its fruits cannot be used in any manner by Federal officials in connection with a criminal prosecution against him. *We conclude, moreover, that in order to implement this constitutional rule and accomplish the interest of the State and Federal Governments in investigating and prosecuting crimes, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.*" (Emphasis added.)

The *Mapp, Ker,* and *Aguilar* cases, wherein this Court incorporated the standards of the Fourth Amendment into the Fourteenth Amendment, arose under state proceedings *where each state failed to apply proper standards.*

We submit that where a State has clearly demonstrated it is applying the correct rule of "the standard of reasonableness" holding invalid unreasonable searches and seizures, that the protection thus afforded by the state which initiated the proceedings should follow into the Federal Court.

While the *Elkins* case said the "test is one of Federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed," there must be a re-evaluation in view of *Ker, Aguilar, Malloy* and *Murphy*. Otherwise, the spirit of *Elkins* is violated and in jeopardy.

The *Murphy* case held "the Federal Government must be prohibited from making use of compelled testimony and its fruits." The same reasoning should forbid the use by the Federal Government of State "compelled" evidence seized by state officers, under state process, clearly in violation of Section 10 of the Bill of Rights of the Kentucky Constitution, where the State holds such evidence inadmissible because of the invalidity of the affidavit and search warrant issued under its (the state's) authority. Where a State upholds and enforces proper standards, as does Kentucky, there should be no necessity for re-assessment by a Federal Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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